

STATE OF MICHIGAN  
COURT OF APPEALS

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ANTHONY POWELL,

Plaintiff-Appellant,

v

GEORGE F. ADAMS, SIDNEY TAVERN, INC.,  
d/b/a BUDD'S SIDNEY TAVERN and LINDSAY  
SOFT WATER CO,

Defendants-Appellees.

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UNPUBLISHED

October 7, 2003

No. 240998

Montcalm Circuit Court

LC No. 00-000722-NF

Before: Smolenski, P.J., and Markey and Wilder, JJ.

PER CURIAM.

This negligence action originates from plaintiff's fall into an open trap door while making a delivery to Sidney Tavern. Plaintiff appeals as of right from the court's March 15, 2002 order granting summary disposition in favor of defendants. This appeal is being decided without oral argument, pursuant to MCR 7.214(E). We affirm in part, reverse in part and remand.

Plaintiff argues that the court erred in granting defendants summary disposition. On appeal, a trial court's grant or denial of summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone." *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

Summary disposition of all or part of a claim or defense may be granted when

[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. [MCR 2.116(C)(10).]

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek, supra* at 337. When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary

evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

The parties do not dispute that defendants Adams and Sidney Tavern owe a general duty to protect their invitees from unreasonable risks of harm. However, plaintiff asserts that the trial court erred in concluding that defendant Lindsay Soft Water Co (“Lindsay”) owed no duty to the tavern’s invitees. We disagree.

The trial court correctly concluded that Lindsay did not owe plaintiff a duty under premises liability because Lindsay did not have actual possession and control over the premises. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998). Lindsay’s employee was simply making a delivery at the tavern and was instructed to remove the trap door in order to place his delivery in the basement.

Plaintiff contends that because his claim against Lindsay was one for ordinary negligence based on vicarious liability, Lindsay can be held directly liable. While we appreciate plaintiff’s position, we conclude that, in essence, plaintiff’s claim against Lindsay is nothing more than a premises liability claim. Plaintiff alleged in his complaint that Lindsay had a duty to warn and protect plaintiff from harm in regards to the open trap door. Premises liability can be proven through three theories: failure to warn, negligent maintenance, or defective physical structure. *Bertrand v Alan Ford, Inc.*, 449 Mich 606, 610; 537 NW2d 185 (1995). Regardless of the label plaintiff assigned it, his negligence claim against Lindsay is based on a condition of the premises, namely, the open trap door. Because plaintiff presented no evidence that Lindsay possessed and controlled the tavern, it owed no duty to warn plaintiff of the condition. *Orel v Uni-Rak Sales Co Inc.*, 454 Mich 564, 568; 563 NW2d 241 (1997).

Plaintiff balks at this result because as he states, “To confuse a negligence theory with a premises liability claim prohibits any recovery based upon the negligence of a non-landowner.” However, we are not confusing negligence through vicarious liability and premises liability; rather, we are simply reiterating a general rule of law. To the extent that a plaintiff is injured on a landowner’s property due to a condition on that property, liability is generally precluded in relation to any non-landowners.<sup>1</sup> “This is so because ‘[T]he man in possession is in a position of control, and normally best able to prevent any harm to others. . . .’” *Id.*, quoting *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980). We note that this rule does not leave a person in plaintiff’s situation without an avenue of recovery, as the owner/possessor of the premises may still be liable.

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<sup>1</sup> In certain circumstances, none of which are applicable here, non-landowners such as independent contractors may be liable to an invitee for the negligent acts of its employees that cause injury as the result of a condition on the premises. However, the claim is still one of premises liability and, therefore, the contractor must have retained possession and control of the premises in order to be liable. See *Plummer v Bechtel Constr Co*, 440 Mich 646; 489 NW2d 66 (1992); *Miller v Great Lakes Steel Corp*, 112 Mich App 122; 315 NW2d 558 (1982); *Signs v Detroit Edison Co*, 93 Mich App 626; 287 NW2d 292 (1979).

Thus, because Lindsay's employee, as a business invitee, owes no duty to plaintiff in regards to the safety of the premises, Lindsay can not be held vicariously liable. Accordingly, the trial court did not err in granting summary disposition in favor of Lindsay pursuant to MCR 2.116(C)(8). *Beaudrie, supra* at 130.

We next address plaintiff's assertion that the trial court erred in granting summary disposition in favor of defendants Adams and Sidney Tavern because it erroneously concluded that the open trap door was an open and obvious condition. "Whether a danger is open and obvious depends upon whether it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection." *Weakley v Dearborn Hts*, 240 Mich App 382, 385; 612 NW2d 428 (2000). An invitor must warn of hidden defects that are not open and obvious dangers. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). As our Supreme Court recently stated:

"[I]f the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions."

In sum, the general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk. [*Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 18; 643 NW2d 212 (2002), quoting *Lugo, supra* at 516-517; emphasis in original.]

Plaintiff contends that by its very nature, a trap door is supposed to be a hidden condition, one that is not open and obvious. While this is true of a *closed* trap door, the determination of open and obvious is in regards to the condition that led to plaintiff's injuries, i.e., the *open* trap door. *Lugo, supra* at 523. Plaintiff testified that he did not see the opening because he was putting his paperwork away, not because he looked and did not see the opening. Also, plaintiff stated that he did not look at the floor because he knew where he was going, having crossed over the location of the trap door several times that day without incident while making his delivery. Regardless of his reasons, we believe that on casual inspection a reasonable person certainly would have discovered the opening. The trap door, when open, exposed an area approximately three foot by five foot. It was located immediately in front of the side door and there was nothing positioned around the opening to obscure plaintiff's view of the opening. Additionally, we find plaintiff's assertion that the tavern was improperly lit to be disingenuous, given the fact he testified that after he crawled out of the opening, the lighting was sufficient to allow him to see the opening clearly. Accordingly, we conclude that the condition caused by the open trap door was open and obvious.

Plaintiff also argues that a “special aspect” rendered the trap door unreasonably dangerous; specifically, the location of the trap door was such that plaintiff could not avoid walking over it in order to exit the tavern. We agree, but for a different reason.

In determining whether a danger presents an unreasonable risk of harm despite being open and obvious, a court must consider whether special aspects exist, such as a condition which is unavoidable or which poses an unreasonably high risk of severe injury. *Lugo, supra* at 516-517. Thus, we must determine

whether there is evidence that creates a genuine issue of material fact regarding whether there are truly “special aspects” of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an *unreasonable* risk of harm, i.e., whether the “special aspect” of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [*Id.* at 517-518; emphasis added.]

The determination must be based on the nature of the condition at issue, and not on the degree of care used by the invitee or his actual knowledge of the condition. *Id.* at 516, 523-524. Thus, plaintiff’s own negligence is not a factor in this determination.<sup>2</sup> *Id.* at 523.

Defendants Adams and Sidney Tavern focus on fact that there were no distractions in the tavern to avert plaintiff’s attention. While this may have been true, it is not determinative of whether there were “special aspects” of the condition that made the risk of harm unreasonable. Illustrating the difference between a typical risk of harm and an unreasonable risk of harm, the *Lugo* Court gave the following example:

To use another example, consider an unguarded thirty foot deep pit in the middle of a parking lot. The condition might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken. [*Lugo, supra* at 518.]

Thus, the *Lugo* Court recognized that “falling an extended distance” created a great likelihood of severe harm.

Following *Lugo*, this Court held in *Woodbury v Bruckner (On Remand)*, 248 Mich App 684, 694; 650 NW2d 343 (2001), that there were sufficient “special aspects” inherent in an unguarded, second-story porch nine feet off the ground to allow a jury to find the condition unreasonably dangerous, despite it being open and obvious. The analysis and result are the same

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<sup>2</sup> Because Michigan follows the rule of comparative negligence, a plaintiff’s negligence does not preclude recovery, but rather reduces the amount of damages. *Lugo, supra* at 523.

in this case as in *Woodbury, supra*, and the example cited above from *Lugo, supra*. As we concluded above, reasonable minds could not differ; the open trap door was an open and obvious condition. However, the opening led to the tavern's basement six feet below. A fall from such a distance is very likely to cause severe harm. Therefore, we believe that, at a minimum, there exists a genuine issue of material fact as to whether the condition posed an unreasonable risk of harm. Accordingly, we hold that the trial court erred in granting summary disposition in favor of defendants Adams and Sidney Tavern.

Affirmed in part, reversed in part and remanded. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Jane E. Markey

/s/ Kurtis T. Wilder